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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RICHARD BREEDLOVE, *et al.*,
Petitioners,

v.

EARTHGRAINS BAKING COMPANIES, INC.,
D/B/A CAMPBELL TAGGART BAKING COMPANY, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Section 5(a)(1)(A) of the Workers Adjustment Retraining Notification Act ("WARN"), 29 U.S.C. § 2104(a)(1)(A), which provides that an employer who orders a plant closing or mass layoff in violation of the sixty day notice requirement to workers is "liable to each aggrieved employee . . . for . . . back pay for each day of violation," entitles those employees to damages for each calendar day of the violation or for each work day.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Richard Breedlove and Nadine Tanner, on behalf of themselves and approximately 100 other similarly situated former workers of Earthgrains Baking Companies, Inc., hereby petition this Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Breedlove, et al., v. Earthgrains Baking Companies, Inc., d/b/a Campbell Taggart Baking Company, Inc.*, 140 F.3d 797 (8th Cir. 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 140 F.3d 797 (8th Cir. 1998), and is reprinted in the Petitioner's Appendix ("Pet. App."), at 1a. The order of the district court is

set forth in Pet. App. 10a. The judgment of the district court is set forth in Pet. App. 16a.

JURISDICTION

The Eighth Circuit issued its opinion on April 9, 1998. This petition was filed within 90 days. This Court has jurisdiction to review pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTES INVOLVED

The relevant portion of the Worker Adjustment and Retraining Notification Act ("WARN" or "the Act"), provides:

> (a) Civil Actions Against Employers
>
> (1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee;
>
> * * * *
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half of the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a) (1988).

STATEMENT OF THE CASE

In December of 1995, Respondent Earthgrains Baking Companies, Inc., d/b/a Campbell Taggart Baking Company, Inc. ("Earthgrains"), announced that it was closing, and shortly thereafter closed its baking plant in Little Rock, Arkansas, allegedly terminating approximately 100 full-time employees. Pet. App. 2a, 21a. In their July, 1996 class action complaint, Pet. App. 17a-25a, Petitioners, former Earthgrains employees, alleged that Earthgrains had violated WARN's notice provision, 29 U.S.C. § 2102(a). Pet. App. at 2a, 18a-23a. Petitioners sought, *inter alia,* "lost salaries, wages and benefits *for each calendar day* in which [Respondent was] in violation of the notice period . . . ." *Id.* at 10a (emphasis added). Respondent thereafter moved to dismiss, claiming that its liability to Petitioners ended at Respondent's payment of wages for each working day during the violation period. *Id.* at 2a. Petitioners then cross-moved for partial summary judgment on the issue. *Id.* at 11a.

On February 10, 1997, the district court granted Respondent's motion to dismiss. The court held that the statutory language "back pay for each day of violation" in and of itself created an ambiguity. *Id.* at 12a. The court then turned to WARN's legislative history and held that a superceded Senate Report on an earlier version of the Act reflected a Congressional intent "that damages should be calculated by working days within the notice period not by calendar days." *Id.* at 15a.

Petitioners appealed to the United States Court of Appeals for the Eighth Circuit. On April 9, 1998, the Eighth Circuit affirmed the district court's decision. In its decision, the Eighth Circuit rejected the Third Circuit's contrary holding in *United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), *reh'g denied*, 511 U.S. 1048 (1994), and adopted the reasoning and conclusions of the Fifth Cir-

cuit in *Carpenters District Council of New Orleans & Vicinity v. Dillard Department Stores, Inc.*, 15 F.3d 1275 (5th Cir. 1995), *cert. denied*, 513 U.S. 1126 (1995),[1] and the Sixth Circuit in *Saxion v. Titan-C Manufacturing Inc.*, 86 F.3d 553 (6th Cir. 1996).

In short, the Eighth Circuit concluded that the plain language of the statute "is susceptible to more than one reasonable interpretation," Pet. App. 6a, and then, like the district court, turned to the same language found in the superceded Senate Report. Pet. App. 7a-8a, *citing* S. Rep. No. 62, 100th Congress, 1st Sess. 24 (1987).[2] The Eighth Circuit relied on the following language of the Report:

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

Pet. App. 7a-8a. Relying on this single passage and the definition of "back pay" under the National Labor Relations Act, the court held that WARN Act damages are compensatory in nature and thus a work day calculation is proper.

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[1] The plaintiffs in *Carpenters* filed a petition for a writ of certiorari. This Court requested that the Solicitor General's office submit an amicus brief on this issue, which it did, recommending that the petition be granted and that the Fifth Circuit opinion be reversed.

[2] The Senate Report was superceded by a Conference Report which omits the language cited and contains language supporting the calendar day interpretation. H.R. Conf. Rep. No. 100-576, 100th Cong., 2nd Sess. 1052-1053 (1988). See discussion at pp. 17-19, *infra*.

REASONS FOR GRANTING THE WRIT

This case involves a conflict among five courts of appeals on a single, well-defined and important question of federal statutory interpretation that arises in each and every WARN case filed in this country. The issue goes to the heart of the meaning and purpose of this important federal labor statute. The fundamental question is whether the purpose of the WARN Act is to ensure that workers receive timely notice of plant closings and mass layoffs and critical retraining and readjustment assistance by providing employers with a clear incentive to comply with the statute, or whether it is merely to compensate workers by providing them with damages in lieu of notice. The former is what the statute plainly states; the latter is a concept which the plain language and structure of the WARN Act itself unambiguously reject, and which Congress, in passing the Act, also flatly rejected. The Eighth Circuit thus committed clear error and its judgment must be reversed.

THE EIGHTH CIRCUIT'S RULING THAT DAMAGES UNDER THE WARN ACT SHOULD BE CALCULATED ACCORDING TO THE NUMBER OF WORK RATHER THAN CALENDAR DAYS WITHIN THE STATUTORY NOTICE PERIOD IGNORES THE SCHEME AND EXPRESS LANGUAGE OF THE ACT, AND CONFLICTS WITH A RULING BY THE THIRD CIRCUIT THEREBY FOSTERING INCREASED LITIGATION THROUGHOUT THE VAST MAJORITY OF FEDERAL CIRCUITS.

I. There Are Now Five Circuits That Have Ruled on This Issue and the Conflict Among Them Has and Will Continue to Foster Litigation and Cause Similarly Situated Workers to Be Compensated Differently.

The WARN Act provides, in pertinent part, that "[a]ny employer who orders a plant closing [in violation of the Act] . . . shall be liable . . . for (A) *back pay for each day* of violation . . . ." 29 U.S.C. § 2104(a)(1)(A) (1988) (emphasis added). The conflict among the courts

of appeals turns on whether Congress intended that the term "back pay," read in conjunction with the term "each day of the violation," is a label for the method to determine the daily statutory penalty rate, or whether it is instead a method to limit damages to purely compensatory relief. Under the first approach, workers are entitled to damages for each *calendar day* of their employer's violation of the Act. Under the latter, compensatory approach, workers are only entitled to damages for each day of their employer's violation of the Act *on which they would have worked.* Given a full sixty day violation of the Act by an employer, the calendar day approach yields 60 days damages, the work day approach just 42, an approximate 30% difference in recovery.[3]

To date, in addition to the Eighth Circuit's decision which is the subject of this writ, three other circuits have adopted the work day approach. *Saxion v. Titan-C-Manufacturing, Inc.*, 86 F.3d 553 (6th Cir. 1996); *Frymire v. Ampex*, 61 F.3d 757 (10th Cir. 1995), *cert. dismissed*, 517 U.S. 1182 (1996); *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't. Stores, Inc.*, 778 F. Supp. 297 (E.D. La. 1991), *aff'd in part, rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). The Third Circuit alone has adopted the calendar day approach. United Steelworkers of America v. North Star Steel Co., 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 114 (1994), *reh'g denied*, 511 U.S. 1048 (1994).

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[3] The work day calculation also gives each employer a window of opportunity to save itself two or more "working days" by terminating employment, or delivering a late WARN notice on a Friday instead of a Monday. Moreover, the employer may make use of any un-paid holidays or self-declared temporary work stoppages falling within the time frame to provide it with still additional non-work day savings. Such manipulation of the notice requirements clearly contradicts Congressional intent that timely notice be provided to employees.

The remaining courts of appeals must choose among these two differing interpretations in ways that promise only to increase the uncertainty about what the law means and the rights and obligations of those to whom it applies. Because of the significant difference in damages yielded by the two approaches, *this uncertainty has and will continue to foster litigation in every WARN Act case in every remaining circuit.* The Ninth Circuit, for instance, is now considering this exact issue, *Burns v. Stone Forest Industries,* appeal docketed, No. 96-35715 (9th Cir., June 12, 1996), and many lower courts have considered the issue as well. Compare *Kalwaytis v. Preferred Meal Systems,* 1996 U.S. App. LEXIS 4207 (3rd Cir. Mar. 11, 1996); *Joshlin v. Gannett River,* 840 F. Supp. 660 (E.D. Ark. 1993); *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc.,* 826 F. Supp. 326, 331 (C.D. Cal. 1993); *Georgia-Pacific v. Unemployment Board,* 630 A.2d 948 (Pa. Commonwealth Ct., 1993); and *United Electrical Workers v. Maxim, Inc.,* 5 IER Cases (BNA) 629, 631-32 (D. Mass. 1990) with *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.,* 1994 U.S. Dist. LEXIS 13904 (W.D. Wash. 3/14/94); *Washington v. Aircap Indus., Inc.,* 860 F. Supp. 307, 311-313 (D.S.C. 1994); and *Jones v. Kayser-Roth Hosiery, Inc.,* 748 F. Supp. 1292, *amended in part,* 753 F. Supp. 218 (E.D. Tenn. 1990).

Consideration of this issue by this Court will eliminate unnecessary litigation; will avoid undue hardships, both on the employees and the employers, whose legal obligations remain uncertain; will promote uniform application of, and recovery under, an important federal statute; and will finally put an end to the continued litigation of this issue.

II. The Eighth Circuit Ignored the Express Language of the Statute, the Entire Statutory Scheme, and the Purpose of the WARN Act Which is to Compensate Workers for Loss of Notice, Not Loss of Employment.

In order to arrive at its conclusion that WARN Act damages are compensatory in nature, thereby justifying the work day approach, the Eighth Circuit violated basic rules of statutory construction by ignoring the Act's purpose, its plain meaning, and the entire statutory scheme.

A. *The Purpose of the WARN Act.*

As an initial matter, the Act must be construed according to its manifestly punitive and deterrent purpose.[4] The principal rationale for WARN's advance notice requirement is to provide an opportunity for the affected government units and unions to assist workers with readjustment assistance and re-employment.[5] Congress thought that this goal could not be realized unless workers had collective access to the facilities of a functioning operation. As the Act's sponsor Senator Metzenbaum explained:

> The important element in our bill is to see to it that people have the time to seek readjustment and re-

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[4] "When interpreting a statute, the courts will not look merely to the particular clause in which the general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Kokoska v. Belford*, 417 U.S. 642, 650, *reh'g denied*, 419 U.S. 886 (1974). *See also, United Food and Commercial Workers v. Brown*, 517 U.S. 544 (1996).

[5] The main vehicle by which this is to be accomplished is the Economic Dislocation and Worker Adjustment Assistance Act ("EDWAA"), 29 U.S.C. §§ 1651-1662b (1988). EDWAA provides adjustment services to dislocated workers by linking state dislocated worker units, local governments, and unions and employers. There is also an opportunity for employees to seek new employment, or retraining and income support through either the Trade Adjustment Assistance program, 19 U.S.C. §§ 2271-2322 (1975), or the NAFTA Transitional Adjustment Assistance program, 19 U.S.C. § 2331 (1993).

> training while they are working . . . . We are not seeking to get workers paid because their plant is closing . . . .

134 Cong. Rec. 15,928 (1988). The utility of having the plant as a place for workers facing a common difficulty to congregate and address its solution is what makes advance notice critical. Quoting the Secretary of Labor's Task Force, Senator Metzenbaum stated:

> Advance notice is essential because notice facilitates greater participation [in retraining, counseling, and placement programs] and because a functioning plant is perhaps the programs' single most important resource.

Id. The concern is that if the workers disperse when they are laid off, few will become involved in worker adjustment programs, whereas two months notice *prior to closing* provides a geographical locus for near-universal participation. Indeed, Senator Metzenbaum cited a General Motors study which documented 15% participation without in-plant involvement, and 85% with in-plant participation. *Id.* This vast disparity and the concern for effective retraining and/or placement is why Congress designed the Act to require employers to give notice, not damages in lieu of notice.

The work day calculation, however, eviscerates this fundamental goal of the Act. It requires only that the employer pay the same amount to its workers as it would have if notice had been given. Thus, there is no penalty for non-compliance and no incentive to comply.

The work day view of WARN Act damages as compensatory relief is also inconsistent with the recent description by this Court of WARN Act damages as "penalties." *North Star Steel,* 515 U.S. 29, 31 (1995) (WARN Act damages are meant to provide for "*penalties* by way of a civil action . . . .") (emphasis added). Compensatory damages are not a penalty; they are a make-whole remedy. Dan B. Dobbs, *The Law of Remedies* § 3.1

(1973). Damages as penalties are meant "to punish and to set an example that will deter similar conduct in the future." *Id.* at § 3.9. Only the calendar day method, which requires an employer who fails to give notice to employees to pay its employees for "each day" of the violation provides employers with an incentive to comply with the Act by penalizing them for non-compliance.

The Eighth Circuit's tentative conclusion that damages under the work day computation are nonetheless punitive is ill-founded. The court found that "[e]mployers are, *in a sense*, penalized by not using the notice provisions because they must pay affected workers wages although no work was done." Pet. App. 8a (emphasis added). Its reasoning here is circular in that it presupposes the very issue at the heart of this controversy: that the payment of WARN damages is the payment of wages for labor rather than a penalty. Moreover, not only are work day damages not punitive, they are not even fully compensatory as they redress only a fraction of the wrong visited upon employees by the non-complying employer. If one accepts the Eighth Circuit's conclusion that WARN damages are in fact wages, in no way do work day damages account for the lack of advanced notice and centralized retraining and placement assistance which are the very purpose of the Act itself. *See supra* pp. 8-9.

B. *The Act's Plain Language and Statutory Scheme.*

In a number of ways, the Eighth Circuit selectively ignores the plain meaning of the statute and the overall statutory scheme. First, as the Third Circuit observed:

> It is undisputed that the days of the violation period are 'calendar days' rather than workdays. *See* 20 C.F.R. § 639.1(a) (1992) ("[WARN] . . . requir[es] employers to provide notification 60 calendar days in advance of plant closings or mass layoffs."); *id.* 639.5(a) ("[N]otice must be given at least 60 calendar days prior to any planned plant closing or mass layoff. . . ."). In fact, no section of WARN expressly

> refers to "workdays" (as opposed to calendar days). Thus, under the plain language of the statute, a violating employer is liable for "back pay" for each of the calendar days of the violation.

North Star Steel, 5 F.3d at 42. A contrary reading violates the basic rule that "[i]dentical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Were a work day interpretation imposed consistently throughout the statute, an employer's obligations would be correspondingly expanded.[6]

The work day approach also renders the following language of the Act's damages provision nonsensical and superfluous:

> Such liability [to aggrieved employees] shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a). If indeed Congress intended the work day approach, then, under the rate of compensation calculation provisions of 29 U.S.C. § 2104(a)(1)(A), the 60 day maximum would only be applicable to employees who worked a contiguous 60 day period immediately prior to their termination, or those who, over the three years immediately preceding their termination, worked on average 60 day contiguous periods. Both of these scenarios defy common sense. The clear and unambiguous reading of the 60 day cap on damages is that it is tied directly to the 60 day advanced notice requirement.

The work day interpretation is also inconsistent with the plain meaning of the seldom exercised civil enforce-

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[6] For instance, the 60 days advanced notice required by the Act, 29 U.S.C. 2102(a), would, given an average 5 day working week, be expanded to 84 days, an interpretation that employers, including Respondent, most assuredly would not urge.

ment provision of the Act, 29 U.S.C. § 2104(a)(3), which provides for a $500 a day civil fine payable to a local governmental authority for the employer's failure to notify it. The Conference Report provides that "the maximum penalty payable to a local government is $30,000." [7] H.R. Conf. Rep. No. 576, 100th Cong. 2d Sess. 1053, *reprinted in* 1988 U.S.C.C.A.N. 2086. Divided by $500 per day, the $30,000 results in 60 days of violation. The anomaly in the Eighth Circuit's reasoning is that one sort of penalty, due the local government, is calculated by calendar days while the other, due the employees, is calculated by working days.

The Eighth Circuit glossed over the statute's inclusion of the phrase "for each day of violation," in contravention of a basic rule of statutory construction that the meaning of a word in a statute should first be determined from the context in which it is used. *Deal v. United States,* 508 U.S. 129, 131 (1993). Moreover, Congress' inclusion of this phrase must be assumed to have had a purpose.[8] As the district court in *Carpenters v. Dillard* reasoned:

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[7] The Conference Report treats the civil fine provision and back pay award similarly, determining the amount owed by subtracting the days of notice actually given from sixty days. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052 (1988).

[8] The Eighth Circuit's disregard of this phrase is not unlike a problem faced just two years ago in another WARN Act case. In *United Food and Commercial Workers v. Brown,* 517 U.S. 544 (1996), the employer asked this Court to conclude that WARN's provision for suits by unions was attributable only to congressional inadvertence. There, this Court said that

> [t]he argument for Brown Shoe's preferred construction simply rests on one speculative possibility in opposing a straightforward reading of the provision that a union may bring suit on behalf of its members . . . Speculation loses, for the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.

Id. at 550.

> There is no rational explanation for inclusion in the Act of the phrase "for each day of violation" if Congress intended to limit an employee's recovery only to wages he would have earned during the period of the violation.

Carpenters District Council of New Orleans and Vicinity v. Dillard Department Stores, Inc., 778 F. Supp. 297, 309 (E.D. La. 1991), *aff'd in part, rev'd in part*, 15 F.3d 1275 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). Had Congress intended compensatory relief, it could have required, for instance, back pay for "the period" of violation, or for each "working day" of the period. It did not.

Further, the Act is clear that damages do not reflect actual losses in wages to employees, unlike traditional compensatory relief. Damages are not computed by looking ahead to what an employee would have earned during the violation period, as is true under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) (1988), or the National Labor Relations Act, 29 U.S.C. § 160 (1988). Accordingly, dislocated workers are not required to mitigate their damages.[9] Employers are also prohibited from offsetting WARN damages by damages acquired by plaintiffs through causes of action arising under employment contracts or other statutes. 29 U.S.C. § 2105 (1988). Finally, Courts are not allowed to equitably enjoin a mass layoff or plant closing, 29 U.S.C. § 2104(b) (1988), in contrast to other laws that provide for make-whole relief. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 231-32 (1982).

Each of the foregoing factors clearly demonstrate the punitive nature of WARN Act damages. However, the

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[9] The Conference Report states: "[The only payments that may offset the back pay remedy are those made by the violating employer. Wages received from another employer, or unemployment compenasion payments received from the State, may not be used to offset the remedy." H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1053 (1988).

Eighth Circuit failed to address any of these factors and instead turned to another statute—the National Labor Relations Act—for a 'make-whole' definition of 'back pay' that supported its finding that the use of that term in conjunction with "for each day of the violation" created an ambiguity that required resort to legislative history. Pet. App. 6a. The Eighth Circuit thus erred by disregarding WARN's abundantly plain statutory scheme.

In sum, workers are compensated under the WARN Act for loss of notice, not loss of employment. The Eighth Circuit erred by treating the WARN Act as one designed merely to provide damages in lieu of notice, a concept unambiguously and unequivocally rejected by Congress. *See infra* pp. 18-19.

III. The Eighth Circuit Erred by Departing from the Plain Meaning of the Act by Relying on Insignificant and Non-Existent Ambiguities.

The Eighth Circuit identified several "ambiguities" in the language of the Act to justify its reliance on the superceded Senate Report on an earlier version of the Act for support of the work day calculation. These purported ambiguities are either non-existent or insignificant. Legislative history is appropriate as "an additional tool of analysis," but only the "most extraordinary showing of contrary intentions" from the legislative record justifies a departure from the 'plain meaning' of the statutory language. *Garcia, et al. v. United States,* 469 U.S. 70, 75 (1984) (*citations omitted*). There was no extraordinary showing of contrary intentions here.

First, the Eighth Circuit followed the Fifth and Sixth Circuits, disagreeing with the Third Circuit's conclusion that the workday calculation would render superfluous the statute's "offset" provision, 29 U.S.C. § 2104(a)(2). *See* Pet. App. 7a (citing *Dillard,* 15 F.3d at 1283 n.14 (5th Cir. 1994); *Saxion,* 86 F.3d at 559-60 (6th Cir. 1996)). That section reduces an employer's liability by "any wages

paid by the employer to the employee for the period of the violation," and by "any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." 29 U.S.C. § 2104(a)(2)(A)(B). The Third Circuit found that under a lost earnings concept, courts would automatically deduct any money paid in excess of lost wages from the damages, rendering the offset provision superfluous. *North Star Steel,* 5 F.3d at 42.

The Eighth Circuit disagreed, relying without comment on the Fifth and Sixth Circuits' rationale. Those courts found that because a terminated employee cannot earn any wages during the violation period, the offset provision applies only to employees suffering a greater than 50 percent reduction of work hours during each month of any 6 month period, and not to those who lose their jobs entirely. *See* Pet. App. 7a (*citing Dillard,* 15 F.3d at 1283 n.14; *Saxion,* 86 F.3d at 559-60). According to the rationale adopted by the Eighth Circuit, the work day interpretation thus does not render the offset provision superfluous. Rather, it fulfills the purpose of the offset provision—to protect employers by ensuring that statutory damages never duplicate wages already received. *See Dillard,* 15 F.3d at 1283, n.14; *Saxion,* 86 F.3d at 559.

This rationale turns on the confused and incorrect notion that only wages are offset, so that the offset provision does not apply to terminated employees. In fact, any money an employer pays that is not actually owed is offset, whether or not the employee is terminated. 29 U.S.C. § 2104(a)(2)(B); *see Jones v. Kayser-Roth Hosiery Inc.,* 748 F. Supp. 1276, *amended in part,* 753 F. Supp. 218 (E.D. Tenn. 1990) (voluntary severance payments deducted). For example, employees on temporary layoff status are entitled to receive notice under the WARN Act and to recover damages if their employer neglects to notify them. *Id.*

The Eighth Circuit then embraced a hypothetical anomaly created by the Sixth Circuit. The court speculated that a full-time employee working 40 hours a week, eight hours a day, would be paid less under the calendar day approach than a part-time employee working one day a week for ten hours. *See* Pet. App. 7a, (citing *Dillard*, 15 F.3d at 1285). *This hypothetical anomaly rests on erroneous assumptions about the rate of compensation.*

The Act requires that employees receive:

> back pay for each day of violation at a rate of compensation not less than the higher of . . . the average regular rate received by such employee during the last 3 years of the employee's employment or . . . the final regular rate received by such employee.

29 U.S.C. § 2104(a)(1)(A) (1988). The term "regular rate" is derived from the Fair Labor Standards Act, which requires that damages be determined by taking the "total remuneration for employment" and dividing it by the number of hours a week the employee actually worked. 29 C.F.R. § 778.109 (1993); 29 U.S.C. § 207(o)(4) (1988). This provision is based on a 40 hour work week. *Id.* A full-time employee is awarded damages based on a 40-hour, five-day week. A part-time employee's hours may be averaged over a 40 hour, five-day week. Hence, the part-time employee who worked a 20 hour week receives damages based on an average of four hours of work per day, five days a week. The Eighth and Sixth Circuits' concerns about inequity are thus unfounded.

Finally, by adopting the rationale of the *Saxion* and *Dillard* courts, the Eighth Circuit disagreed with the Third Circuit's conclusion that a work day computation creates a conflict between WARN's damages provision, 29 U.S.C. § 2104(a)(1), and its offset provision, 29 U.S.C. § 2104 (a)(2)(A), by allowing the employer "to reduce its liability by any earnings that the employees received during the period of the violation, even if those earnings were received from a different employer." *See* Pet. App. 7a

(*citing Dillard,* 15 F.3d at 1284 n.14). The Eighth Circuit was apparently untroubled by Congress' failure expressly to allow employers to reduce their liability by the amount of their employees' outside earnings, speculating that the omission was attributable to other factors. *Id.* Yet *Saxion, Dillard* and the Eighth Circuit all fail to cite any supporting authority for the assumption. Indeed, the language of the statute itself indicates that Congress did not intend WARN Act damages to be offset in this manner. 29 U.S.C. § 2104(a)(2)(A) ("The amount for which an employer is liable under paragraph (1) shall be reduced by (A) any wages paid by *the employer* to the employee for the period of the violation.") (emphasis added). The Eighth Circuit's interpretation (really that of the *Saxion* and *Dillard* courts), creates a conflict between the statutory provisions for damages and offset, and was error.

IV. The Eight Circuit Erred by Resorting to Legislative History Which Conflicts With the Express Terms of the Statute.

In light of the foregoing, the Eighth Circuit should not have disregarded the text of the statute and turned to the superceded Senate Report which does not clarify this issue at all and *is itself internally inconsistent.* The passage relied upon by the Eighth Circuit states:

> For violations of the notice provisions, damages are to be measured by the wages the employee would have received had the plant remained open or the layoff had been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

Pet. App. 8a, *citing* S. Rep. No. 100-62, at 24. The first sentence of this passage would seem to support a work

day computation. But the make whole remedy suggested there is entirely inconsistent with the second sentence which states that the damages are intended to be punitive and a deterrent, a notion that is itself inconsistent with the concept of liquidated damages, which cannot be punitive. Dobbs, Remedies § 12.5 at 821.

In short, this single, superceded Senate Report makes little sense and cannot, in and of itself, be justifiably relied upon to determine such a critical and wide impacting issue of federal law. At minimum, this confused passage falls far short of the "extraordinary showing of contrary intentions" required by this Court when resorting to legislative history as a tool of statutory analysis. *Garcia, et al. v. United States*, 469 U.S. 70, 75 (1984) (*citations omitted*).

Further, a Conference Report superceded this Senate Report and the problematic language does not appear there. Significantly, the section on damages in that report contains other language supporting the calendar day interpretation. *See* H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1052-1053 (1988). In fact, the Conference Report provides that "for *each day of violation*, an employer is liable to each aggrieved employee for the amount paid in wages and benefits to such employee prior to the layoff, as set forth in section [5(a)(1)]." *Id.* at 1052 (emphasis added).

Additionally, the Eighth Circuit all but ignored an amendment offered by Senator Quayle and expressly rejected by Congress that would have treated WARN Act damages as compensatory in purpose. 134 Cong. Rec. 15,926 (June 24, 1988). The rejected amendment, as explained by Senator Quayle, would have allowed "60 days severance pay in lieu of notice." *Id.* Arguing against the amendment, Senator Metzenbaum, the Act's sponsor, stated: "The bill is about giving notice. It is not a mandatory severance bill . . . ." *Id.*

The Eighth Circuit found that the rejection of the amendment evinced a congressional purpose to require employers to give notice instead of pay in lieu thereof. Pet. App. 9a. Nonetheless, the court found this clear purpose unpersuasive in light of the superceded Senate Report, and thus adopted the work day approach in direct contravention of this recognized purpose, expressly allowing employers to do what Congress would not.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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